United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1204

B

P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO.74-1204

COALITION FOR EDUCATION IN DISTRICT ONE, et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants

CAROLYN KOZLOWSKY,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

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REPLY BRIEF FOR THE APPELLANT CAROLYN KOZLOWSKY

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On The Brief

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STATEMENT

The appeal hereinbeing an expedited one, appellant KOZLOWSKY's time to prepare, serve and file a reply brief being limited to a few days, the within reply is directed only to the following two specific points in appellees' brief, to wit:

"The discrimination could have changed the outcome of the election" (Point II, A, 1; page 51*)

"In setting aside the election the District Court applied the established New York State remedy" (Point II, B; page 57*)

POINT I

BASED UPON THE DISTRICT COURT FINDING OF OF ABSENCE OF GROSS, FLAGRANT OR INTENTIONAL DISCRIMINATION, APPELLEES WERE REQUIRED TO ESTABLISH THE DISCRIMINATION HEREIN FOUND WAS SUCH THAT IT "PROBABLY" WOULD HAVE AFFECTED THE OUTCOME OF THE ELECTION AND HAVE FAILED TO DO SO.

It is an accepted principle that the electoral process lies at the very foundation of our society, that a completed election represents the expressed voice of the people or electorate in whom all power resides, and that our courts are reluctant to, and do only under the most flagrant circumstances, set aside a completed election and thus thwart the expressed voice of the people.

Illegal election activities which have moved courts to set aside elections may be divided into two (2) essential categories, as follows:

1. Wilful, fraudulent, intentional, flagrant, indefensible, illegal acts, including racial discrimination of that character; in general, those illegal activities which are so gross as to on their face offend and outrage decency.

2. Irregularities, which would include uninten-

* References are to pages of Brief for Plaintiffs-Appellees

tional, unsubstantial acts of racial discrimination.

Dependent upon the illegal activity involved, the effect thereof on the outcome of the challenged election is admeasured by different standards. Thus, although such is not the instant case, if the illegal activity consisted of acts in the first category above enumerated, and affected a substantial number of voters, the courts have held that only the "possibility" that such illegal activity would affect the result of the election is sufficient to set it aside. (Hamer v Campbell, 358 F 2d 215 (5th Cir. 1966); Gross v Thaler, 18 A.D. 2d 716, 236 N.Y.S. 2d 394 (1962).

Where, however, as in the instant case, the District Court has found the irregularities, no one of which was substantial, but that the totality of which had a negative racial impact, it was incumbent upon those challenging the election and seeking to have it set aside to establish that those unintentional activities found by the court below would "probably" have affected the outcome of the election, before the court could set it aside. The record herein fails to support such "probability" test. (Gray v Main, 309 F. Supp. 207 (M.D. Ala 1968); Stevenson v Nine, 35 A.D. 2d 121, 314 N.Y.S. 2d 185 (1970).

New York State courts have held that a court should not strain to order a new election everytime results are close, without evidence of fraud or other intentional misconduct. In Stevenson, supra, there was an error by a referee in failing to count 84 votes - the candidates respectively receiving 715, 642, and 502 votes. The candidate finishing second challenged counted

the election since he required only 73 additional votes. The court held that the mathematical possibility that the challenging candidate would receive 73 out of the 84 uncounted votes was not sufficient ground to overturn the election, since, under the "probabilities" test, it could not be rationally concluded that he would have obtained from the 84 uncounted votes the 73 votes by which he lost the election.

Appellees to support their contention that there need be only a showing of the "possibility" that the results of the election would be chnaged, and that is the standard to be applied, cite in support thereof, People v Beatty, NYLJ pp. 17-18 (9/14/73; Toney v White, 488 F.2d 310 (5th Cir. 1973, en banc) and Bolar v Dinkins, Sup. Ct., N.Y. County 3/19/73. (Appellees Brief page 52).

Beatty, supra, is a "quo warranto" proceeding brought by the Attorney General of the State of New York wherein the State itself sought to set aside a school board election because of the fraud and forgeries of the elected candidates themselves, which were illegal acts of the magnitude as referred to in the first category hereinbefore set forth, and on its facts, the court consistent with New York applicable law found that where wrongful acts of such proportion have occurred the court will not apply the "probabilities" test.

TONEY, supra, contrary to appellees contention found "probability" rather than "possibility" when it stated:

> " * * * the district court made the well supported finding that the results of the election could well have depended on the absentee vote * *"

Bolar v. Dinkins, supra, is a consent judgment entered into by all parties, with concurrence of the Attorney General of the State of New York, and without such consent it would appear the Court was without jurisdiction to set aside a general election Kranis v. Monserrat ,1970 63 Misc. 2d 119, 310 NYS2d 521, Matter of Mansfield v. Epstein 5 N.Y. 2d 70. The writer has been consulted with respect to prosecuting an appeal from the Bolar judgment, and such procedure is now under consideration.

The logic and reasonableness of the "probabilities" test in the absence of fraud or wilful misconduct is too compelling not to apply to an election merely because it is conducted by the proportional representation method. In the instant case the appellants have clearly shown that the irregularities complained of would not have"probably changed the outcome of the election.

A. The District Court failed to apply New York Law.

Appellees cite Section 330 (2) of the Election Law of New York as authority for the New York courts to set aside an election (Appellees Brief, page 57). This section has no applicability whatsoever to a completed general election, any by its own provisions applies only to a primary election which the court is authorized and empowered to set aside and to a nominating party convention, which is also similarly subject to court review.

In Kranis v Monserrat, supra, which involved a defeated candidate's attempt to set aside a completed school board election, the court stated:

> "The Supreme Court is not vested with any inherent power to extend a judicial review of an election matter beyond that provided by statute (Matter of Narel v Kerr, 22 A.D. 2d 979). It only has such power as is given it by statute (Matter of Mansfield v Epstein 5 N.Y. 2d 70). Not even its equity powers give it jurisdiction (Schieffelin v Komfort, 212 N.Y. 520, 535). It has no power to summarily cancel, set aside or annul a general election. (Matter of Oster v Village of Jordan, 42 Misc 2d 432), or to order a new general election. (Matter of Ryan v. Kalin 48 Misc 2d 27; Matter of Periconi v Power, 48 Misc 2d 391)."

Appelles cite Ippolito v Power, 22 N.Y. 2d 594 to support the proposition that a new election may be ordered even though there is no proof of intentional misconduct (Appellees Brief page 57). Ippolito gives no comfort to appellees, for

it rather supports and confirms appellant Kozlowsky's position heretofore expressed position with respect to the "probabilities" test being applicable where there was not any intentional misconduct and the election therein was set aside because the "probability" test was met.

In Ippolito, a total vote of 2827 ballots was cast, 1422 for the winner, 1405 for the loser with 101 votes suspect or invalid for irregularities. The New York Court of Appeals (page 597-598)

> "*****if irregularities are sufficiently large in number to establish the probability that the results would be changedby a shift in orinvalidation of, the questioned votes, there should be a new election.** ****'An election will not be overturned upon a mere mathematical possibility that the results could have been changed, when the probabilities all combine to repel any such conclusion.'****** but in cases like the one now before the court***** it does not strain the probabilities to assume a likelihood that the questioned votes produced or could produce a change in the result."

POINT II

PROOF OF POST ELECTION DILIGENCE IS ESSENTIAL IN ORDER TO SET ASIDE AN ELECTION.

Appellees equate post election diligence with laches (p.53-56) and contend that if laches is asserted by appellants such is a matter of defense and must be affirmatively pleaded(p.56)

Appellees apparently concede that pre-election diligence is required by a party challenging an election for they profess to have exercised unassailable pre-election diligence. Appellant Kozlowsky relies on her discussion of the appellees lack of pre-election diligence as set forth in her main brief.

The requirement of post-election diligence is set forth in the reported cases. Thus, McGill v. Ryals 253 F. Sup. 374, speaks of pre and post-election diligence in the same breath when it states:

> ***** no relief was sought prior to the election attacked, nor was relief sought within a reasonable time thereafter" (p.376)

Post-election diligence is a sine quo non to be established by the party challenging an election. There must be some finality to an election and a party cannot sit by and at any time he desires institute an action to void an election, placing the burden of prooving laches upon the defendant.In the within action the candidates elected were known to be elcted on May 1, 1973; the successful candidates were sworn in

and took office on July 1, 1973 for a two year term. Proper diligence on the part of the appellees would have moved them to institute this election challange action within at least the two month period elapsing between the date of the election and the date of assuming office.

If post-election diligence were not a requirement as appellees contend, it would follow that an action instituted by them for the relief herein sought could just as readily have been commenced at any time, 6, 9, or even 18 months after the election

Such a position is completely untenable in the light of the short periods of time that State election laws provide for the challenging of an election; i.e. New York Election Law §330 provides for 10 days to challange an election. Toney v. White supra., recognizes the requirment for post election diligence by specifically holding that the institution of an action 30 days after the election met the post-election diligence requirement.

No logical distinction can be drawn between pre and post-election diligence by claiming that the former is a condition precedent and the latter an affirmative defense since the requirement of diligence is intended to insurefinality of elections and the stability of government.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED IN ALL RESPECTS AND THE COMPLAINT DISMISSED.

Respectfully submitted,

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I certify that I served the within Reply Brief upon Adrian P. Burke Corporation Counsel by delivering same to Jeffrey Kaye asst corporation Counsel on April 5, 1974

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